A

Public Prosecutor v Lau Poh Ann

B HIGH COURT (SHAH ALAM) — CRIMINAL TRIAL NO 45B-1–01 OF 2015
SM KOMATHY JC
20 FEBRUARY 2018

C *Criminal Law — Murder — Defence of provocation — Accused hit deceased on head with potted plant — Grave and sudden provocation — No cooling off, contemplation or pondering of next course of action or response — Whether evidence and facts adduced established case of culpable homicide not amounting to murder — Penal Code ss 300, 302 & 304(b)*

D

The accused was charged with the murder of the deceased. The accused and deceased were neighbours at their business premises. On 5 February 2014 at about 2pm, the accused was seen opening his shop. On seeing the accused, the E deceased told his wife that he was going over to the accused's shop to inquire about his car alarm and told her to record on her mobile phone if an argument broke out between him and the deceased as the accused was known to have a hot temper. Shortly after the deceased enquiring about the car alarm, the accused got into a customer's car parked inside his shop and was in the process F of reversing it when the deceased pulled the collapsible grill door and the car driven by the accused later crashed into the grill door. On examining the damage to the rear of the car and the grill, the accused became livid and a verbal altercation broke out. The accused asked who was to bear the costs of the damage and the deceased responded by challenging the accused to hit him G saying 'mari mari mari pukul, pukul pukul ... saya tak ada duit, mari pukul, pukul pukul' where the accused picked up a potted woody plant and hit the deceased on the head. The accused continued hitting the deceased several more times despite the efforts of the accused's wife to stop him. The deceased was brought to the general hospital where he underwent two surgical procedures H but the deceased succumbed to his injuries three days later. Counsel for the accused had raised three points at the close of the prosecution's case: (a) there was no evidence to prove identity of the deceased; (b) there was insufficient evidence to show that the death of the deceased was due to injuries he sustained as a result of the accused hitting him with the potted plant; and (c) that the I deceased died from treatment he received at the hospital. The defence also argued that the evidence and facts adduced established a case of culpable homicide not amounting to murder as it fell within Exception 1 to s 300 of the Penal Code and urged the court to reduce the charge to s 304(b) of the Penal Code.

Held, reducing charge to culpable homicide not amounting to murder under s 304(b) of the Penal Code and sentencing accused to eight years imprisonment:

(1) There was ample evidence to prove that the death of the deceased, Lee Soon Kim had taken place. There was also evidence of the pathologist that showed the cause of death of the deceased was due to brain injury sustained from being hit with the potted plant. Besides that, there was no evidence to suggest that the two doctors who treated the deceased were not competent to perform surgical procedures on the deceased (see para 14).

(2) The accused could claim the benefit of Exception 1. On the evidence, there was sudden and unexpected provocation that emanated from the deceased. The interval between the provocation and the homicide was brief where the deceased was killed within a minute after the provocation. The deceased knew that the accused was a hot-tempered man and deliberately provoked him for no reason. The accused never reacted to the deceased's provocation and only lost control of himself and hit the latter with the potted plant only when he saw the damage to his customer's car and grill door. Something in the accused suddenly snapped and he spontaneously reacted in the heat of the moment without any time for cooling off, contemplation or pondering of his next course of action or response. The accused had hit the deceased with the potted plant in a fit of temper whilst deprived of the power of self-control by grave and sudden provocation (see paras 22 & 25–26).

[Bahasa Malaysia summary

Tertuduh telah dituduh kerana membunuh si mati. Tertuduh dan si mati berjiran di premis perniagaan mereka. Pada 5 Februari 2014 lebih kurang 2 petang, tertuduh dilihat membuka kedainya. Apabila melihat tertuduh, si mati memberitahu isterinya bahawa dia hendak ke kedai tertuduh untuk bertanyakan tentang penggera keretanya dan memberitahunya untuk merakamnya dalam telefon bimbitnya jika pergaduhan berlaku antaranya dan si mati kerana si mati dikenali sebagai seorang yang panas baran. Sejurus selepas si mati bertanyakan tentang penggera kereta itu, si mati telah masuk ke dalam kereta pelanggan yang diletakkan di dalam kedainya dan sedang dalam proses mengundurkannya apabila si mati menarik pintu gril yang boleh dilipat dan kereta yang dipandu oleh tertuduh kemudian telah melanggar pintu gril itu. Apabila memeriksa kerosakan kepada belakang kereta itu dan gril itu, tertuduh menjadi marah dan perbalahan lisan berlaku. Tertuduh bertanyakan siapa yang akan menanggung kos kerosakan itu dan si mati menjawab dengan mencabar tertuduh untuk memukulnya dengan berkata 'mari mari mari pukul, pukul pukul ... saya tak ada duit, mari pukul, pukul pukul' yang mana tertuduh telah mengangkat tumbuhan kayu berpasu dan memukul si mati di kepala. Tertuduh terus memukul si mati beberapa kali meskipun isteri

tertuduh berusaha untuk menghentikannya. Si mati telah dibawa ke hospital besar di mana dia menjalani dua prosedur pembedahan tetapi si mati telah meninggal dunia akibat kecederaannya tiga hari kemudian. Peguam bagi pihak tertuduh telah menimbulkan tiga perkara di penutup kes pendakwaan: (a) tiada keterangan untuk membuktikan identiti si mati; (b) tiada keterangan yang tidak mencukupi untuk menunjukkan kematian si mati adalah akibat kecederaan yang dialaminya disebabkan pukulan tertuduh ke atasnya dengan tanaman berpasu itu; dan (c) bahawa si mati meninggal dunia daripada rawatan yang diterimanya di hospital. Pembelaan juga berhujah bahawa keterangan dan fakta mengemukakan kes mematikan orang dengan salah yang tidak terjumlah kepada kesalahan membunuh orang kerana ia terjatuh dalam Pengecualian 1 kepada s 300 Kanun Keseksaan dan mendesak mahkamah mengurangkan pertuduhan kepada s 304(b) Kanun Keseksaan.

Diputuskan, mengurangkan pertuduhan kepada mematikan orang dengan salah yang tidak terjumlah kepada kesalahan membunuh orang di bawah s 304(b) Kanun Keseksaan dan menjatuhkan hukuman penjara lapan tahun ke atas tertuduh:

(1) Terdapat keterangan yang cukup untuk membuktikan bahawa kematian si mati, Lee Soon Kim telah berlaku. Terdapat juga keterangan ahli patologi yang menunjukkan sebab kematian si mati adalah akibat kecederaan otak yang dialami kerana dipukul dengan tanaman berpasu. Selain itu, tiada keterangan yang mencadangkan bahawa dua doktor yang merawat si mati tidak kompeten untuk melaksanakan prosedur-prosedur pembedahan ke atas si mati (lihat perenggan 14).

(2) Tertuduh boleh menuntut manfaat daripada Pengecualian 1. Berdasarkan keterangan, terdapat provokasi secara tiba-tiba dan tidak dijangka berpunca daripada si mati. Jarak waktu antara provokasi itu dan pembunuhan itu adalah pendek di mana si mati telah dibunuh dalam masa satu minit selepas provokasi itu. Si mati mengetahui bahawa tertuduh seorang yang panas baran dan sengaja memprovokasikannya tanpa sebab. Tertuduh tidak pernah bertindak balas terhadap provokasi si mati dan hanya hilang kawalan dirinya dan memukul si mati dengan tanaman berpasu setelah dia melihat kerosakan kepada kereta pelanggannya dan pintu gril itu. Sesuatu dalam diri tertuduh tiba-tiba sentap dan dia secara spontan bertindak balas pada masa itu tanpa ada masa untuk bertenang, merenung atau memikirkan tindakan atau tindak balas selanjutnya. Tertuduh telah memukul si mati dengan tanaman berpasu dalam keadaan marah dan tiada kuasa untuk mengawal diri sendiri akibat provokasi secara tiba-tiba dan tidak dijangkakan itu (lihat perenggan 22 & 25–26).]

Notes

For a case on defence of provocation, see 4(2) *Mallal's Digest* (5th Ed, 2015) para 1806.

Cases referred to

Che Omar bin Mohd Akhir v PP [2007] 4 MLJ 309; [2007] 3 CLJ 281, FC (refd)
Lorensus Tukan v PP [1988] 1 MLJ 251, SC (refd)
Manchini v Director of Public Prosecutions [1941] 3 All ER 272, HL (refd)
PP v Subir Gole [2015] 2 MLJ 642; 2015] 2 AMR 393, CA (refd)

Legislation referred to

Penal Code ss 300, 302, 304(b)

Rajpal Singh (Tiew Poh Nee with him) (Rajpal, Firah & Vishnu) for the accused.
Aidatul Azura bt Zainal Abidin (Deputy Public Prosecutor, Attorney General's Chambers) for the public prosecutor.

SM Komathy JC:

[1] This is an unfortunate case. On the fateful day, ie 5 February 2014, at about 2pm, the accused and Lee Soon Kim ('the deceased'), who were neighbours at their business premises, were involved in an altercation. The altercation culminated in the accused striking the deceased with a potted woody plant. The deceased succumbed to his injuries three days later. The deceased succumbed to the injuries some three days later.

[2] The accused was subsequently arrested and charged with the murder of the deceased. The charge against him was in these terms:

> Bahawa kamu pada 5 Februari 2014, pada jam lebih kurang 2.00 petang, bertempat di hadapan bengkel Lot 577, Jalan 1B/7, Bandar Baru Sungai Buloh, dalam Daerah Petaling, dalam Negeri Selangor Darul Ehsan, telah membunuh Lee Soo Kim (No K/P: 720218-14-5225), dan dengan itu kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

[3] The prosecution examined nine witnesses to establish the charge. There was no serious dispute on most of the primary facts save and except for the cause of death.

[4] The undisputed evidence disclosed these facts. The accused and the deceased operated their businesses in two adjacent shoplots in Bandar Baru Sg Buloh, Kuala Lumpur. At about noon on the date of the incident, the deceased and his wife ('PW3') were at their shop. At about 2pm, the accused was seen opening his shop, where he carried on a motor repair business, after having

A closed it for several days for Chinese New Year. The accused's wife and young child were with him.

B **[5]** On seeing the accused, the deceased told PW3 that he was going over to the accused's shop to inquire about his car alarm. He told her to video record on her mobile phone if an argument broke out between him and the deceased. According to PW3, the deceased requested her to video record as the accused was known to be a hot tempered man who had on one occasion poured water on the deceased. She heard the deceased asking the accused about his car alarm system that he (the deceased) claimed was missing since the date the accused repaired his car, a few days before Chinese New Year. The accused answered that he had not taken it and asked the deceased to come inside the shop and to look for it himself. The deceased declined and told the accused that he did not want to be blamed if anything went missing from his shop. The deceased kept on asking the accused to look for his alarm but the latter ignored him and went about his work.

E **[6]** Shortly thereafter, the accused got into a customer's car parked inside his shop, and was in the process of reversing it, when the deceased who was standing at the five foot way of the shop, pulled the collapsible grill door to prevent the car from moving. When the deceased did that, the car driven by the accused crashed into the grill door. The accused got out of the car and raised his voice at the deceased and slapped him. At this point, PW3 started to video record the events that unfolded.

F **[7]** On examining the damage to the rear of the car and the gate, the accused became livid and a verbal altercation in Chinese broke out between the two. The accused asked who was to bear the costs of the damage and the deceased responded by challenging the accused to hit him saying 'mari mari mari pukul, pukul pukul ... saya tak ada duit, mari pukul, pukul pukul'. At this juncture, the accused picked up a potted woody plant that was on the five foot way of the deceased's shop and hit him on the head with it and the latter fell to the ground. The accused continued hitting him a few more times despite the frantic efforts of his (the accused) wife to stop him.

H **[8]** The incident was also witnessed by PW6, who was an employee at the shop adjacent to the accused's shop. He said that all this happened in the blink of an eye.

I **[9]** The deceased was rushed to the general hospital, and at about 6.35pm that day, a medical procedure craniotomy was performed and he was put on a ventilator. A second surgical procedure was done the next day. Among the two doctors who performed the procedures on the deceased and attended to him were PW7 and PW10. The deceased died three days later on 8 February 2014

at 3pm, when he was taken off the ventilator with the consent of PW3. A

[10] PW3 handed her phone that contained the video recording of the incident to ASP Ahmad Marzuqi, the investigating officer ('PW9') and the recording was played in court. B

[11] Dr Shahidan bin Md Noor ('PW4'), a pathologist, conducted a post mortem report on the deceased, aged 41, that same day at about 9.35pm. He found that the back of the head was badly bruised. The brain was swollen and injured. There were cracked fracture lines base of the skull. The Dr Shahidan concluded the cause of death was 'head injury due to blunt forces trauma'. C

[12] At the close of the prosecution's case, counsel for the accused raised three points. His first point was that there was no evidence to prove the identity of the deceased. Secondly, that there was insufficient evidence to show that the death of the deceased was due to the injuries he sustained as a result of the accused hitting him with the potted plant. It was submitted that the deceased died from the treatment he received at the hospital as the two doctors who attended to him were not qualified neurosurgeons and were incompetent to do the two surgical procedures on the deceased. D E

[13] Alternatively, it was argued for the defence that the evidence and facts adduced through the prosecution's witnesses established that this was a case of culpable homicide not amounting to murder as it fell within Exception 1 to s 300 of the Penal Code. Counsel urged the court to reduce the charge against the accused from ss 302–304(b) of the Penal Code. F

[14] I found no merit in the first point as there was ample evidence to prove that the death of the deceased Lee Soon Kim had taken place. The second point was also without substance. The evidence of the pathologist showed that the cause of death of the deceased was due to the brain injury he sustained from being hit with the potted plant by the accused. Furthermore, there was nothing in the evidence to suggest that the two doctors who treated the deceased were not competent to perform the surgical procedures on the deceased. G H

[15] That brings me to his alternative submission of counsel based on provocation. Exception 1 to s 300 of the Penal Code codifies the defence of provocation. Section 300 of the Penal Code provides: I

> Except in the cases hereinafter excepted, culpable homicide is murder —
>
> (a) if the act by which the death is caused is done with the intention of causing death;

A (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary B course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

C ...

Exception 1 — Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by *grave* and *sudden provocation,* causes death of the person who gave the provocation, or causes the death of any other person by mistake or D accident.

The above exception is subject to three provisos:

(a) that the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person;

E (b) that the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant;

(c) that the provocation is not given by anything done in the lawful exercise of the right of private defence.

F Explanation — whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact.

[16] It is plain that Exception 1 to s 300 codifies the principle that if G homicide is committed in the face of grave and sudden provocation emanating from the victim, the charge of murder by person for such grave and sudden provocation from the victim reduces the charge of murder to culpable homicide not amounting to murder. Explanation 1 was enacted essentially to reconcile respect for the sanctity of human life with recognition of the effect of H provocation upon human frailty. As the factual circumstances in which a person may be provoked into losing control are of infinite variety, Explanation 1 to s 300 perforce does not lay down any general principle for determining when a particular provocation should be recognised as grave. Explanation 1 provides that the court must decide on the particular I circumstances of that case whether the provocation was grave and sudden enough to permit an indulgent view of the crime committed by the accused.

[17] What then constitutes grave and sudden provocation? Is the loss of self-control a test of its gravity. Valuable guidance is afforded by decisions

locally and in the English courts. See *Che Omar bin Mohd Akhir v Public Prosecutor* [2007] 4 MLJ 309; [2007] 3 CLJ 281, *Public Prosecutor v Subir Gole* [2015] 2 MLJ 642; [2015] 2 AMR 393, *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251, and *Manchini v Director of Public Prosecutions* [1941] 3 All ER 272

[18] In *Lorensus*, the Malaysian Supreme Court explained:

> The test of 'grave and sudden' provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control (see *Nanavati v State of Maharashtra* AIR 1962 SC 605 530) ... For what a reasonable man will do in certain circumstances depends upon the customs, manners, way of life, traditional value, *etc.* In short, the cultural, social and emotional background of the society to which an accused belongs.

[19] In *Che Omar bin Mohd Akhir*, the Supreme Court adverted to the defence of grave and sudden provocation as follows:

> In determining what amounts to grave and sudden provocation the court may take into account the habits, manners and feelings of the class or community to which the accused belongs, but not of the particular idiosyncracies of the accused (see *Madhavan v State of Kerala* AIR 1966 Ker 258 (260)). It is also said that the defence of provocation is a dual one: the alleged provocative conduct must be such as: (i) actually causes in the accused; and (ii) might cause in a reasonable man, a sudden and temporary loss of self-control as the result of which he kills the deceased. Thus, in order to successfully set up provocation as a defence for the reduction of the offence of murder to one of culpable homicide not amounting to murder, it is not enough to show that the accused was provoked into losing his self-control; it must be shown that the provocation was grave and sudden and must have by its gravity and suddenness caused a reasonable man to lose his self-control and induced him to do the act which caused the death of the deceased. In determining that question the court may also consider, along with other factors, the nature of the retaliation by the accused, having regard to the nature of the provocation.

[20] The Privy Council in the case of *Manchini v Director of Public Prosecutions* observed:

> It is not all provocation that will reduce the crime of murder to manslaughter. Provocation, to have that result, must be such as temporarily deprives the person provoked of the power of self control, as the result of which he commits the unlawful act which causes death. In deciding the question whether this was or was not the case, regard must be had to 'the nature of the act by which the offender causes death, to the time which elapsed between the provocation and the act which caused death, to the offender's conduct during that interval, and to all other circumstances tending to show 'the state of his mind': The test to be applied is that of the effect of the provocation on a reasonable man, as was laid down by the Court of Criminal Appeal in *Rex v Lesbini (I)* , so that an unusually excitable or pugnacious

A individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance (a) to consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (b) to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation, by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter.

[21] It is clear from the foregoing that the requirements of Exception 1 to s 300 are: (1) provocation (2) that such provocation must be sudden and grave; and (3) that same should emanate from the victim. The court has to apply an objective test for deciding whether the provocation was grave or not. The test is whether a reasonable man is likely to lose self-control as a result of such provocation. If the answer is in the affirmative, the provocation would be classed as grave. A reasonable man is not the ideal man or the perfect being. He is the ordinary or normal reasonable man. A reasonable man will vary from society to society. The test is whether a reasonable man belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked so as lose his self-control. The mental background created by the previous act or words of the victim need also to be taken into consideration. The provocation could be an act or series of acts done by the deceased to the accused.

[22] In the instant case, that there was provocation and it emanated from the deceased was clear on the evidence. It was also clear that it was sudden and unexpected. The interval between the provocation and homicide was brief. The deceased was killed within a minute after the provocation.

[23] The next question for consideration was whether the provocation in this case was grave enough to prevent the crime from amounting to murder. The factual matrix of the case must be examined and evaluated to determine whether there was evidence that showed that the provocation by the deceased was sufficient to lead a reasonable person to do what the accused did. It was patently clear on the evidence that on the date of the incident, the accused had come to his shop with his wife and child to resume business after having closed his shop for a few days in conjunction with Chinese New Year. The accused had no intention or motive to kill the deceased that day when he came to open his shop that afternoon for business.

[24] It was the deceased who came to the accused's shop and harassed him to look for his car alarm which he claimed went missing after the accused had repaired his car. It was important to note that the accused had just arrived and was in the processing of getting ready to start his work at that time. The accused

invited the deceased to come inside his shop and look for it himself, but the deceased continued the harassment. The accused ignored him and did not react. The deceased deliberately irritated the accused knowing he was a man with a violent disposition and easily liable to loose control of himself. Furthermore, he expected a flare up of sorts because he asked his wife to capture his 'meeting' with the accused on her mobile phone. It was obvious that the deceased's intention in pulling the grill door as the accused was reversing his customer's car was to provoke the accused to react violently. The deceased persisted in irritating the accused when it would have become apparent to him that the accused was livid on seeing the damage to the car and grill door. The deceased mocked and challenged the accused to hit him as he had no money. At this point the provocation proved too strong for the accused and he picked up the potted plant and hit the deceased.

[25] Applying the principles enunciated in the foregoing paragraphs to the facts of the present case, I was satisfied that the accused can claim the benefit of Exception 1. He had hit the deceased with the potted plant whilst deprived of the power of self-control by grave and sudden provocation. The deceased knew the accused was a hot tempered man and deliberately provoked him for no reason. It was significant that the accused never reacted to the deceased's provocation and only lost control of himself and hit the latter with the potted plant only when he saw the damage to his customer's car and grill door.

[26] The accused was a mechanic by profession and it would have been in his mind that the damage to his customer's cars could significantly affect his reputation and business. As a mechanic, he was responsible to take care of his customers cars entrusted with him. Something in him suddenly snapped and he spontaneously reacted in the heat of the moment without any time for cooling off, contemplation or pondering of his next course of action or response. Something in him reasonable or normal person would have reacted in the same way under the strain of a similar provocation. It is noteworthy that the accused did not even react when the deceased obliquely accused him of theft of his car alarm. He only lost control of his temper when the deceased caused his customer's car and grill door to be damaged. In a fit of temper he hit the deceased with the potted plant whilst deprived of the power of self-control by grave and sudden provocation.

CONCLUSION

[27] For the reasons given, I reduced the charge of murder under s 302 to one of culpable homicide not amounting to murder and punishable under s 304(b) of the Penal Code. The accused pleaded guilty to the amended charge and was convicted. Counsel for the accused suggested that the accused be incarcerated for six years from the date of his arrest.

[28] As this was not a case of premeditated or cold blooded murder, I sentenced the accused to eight years imprisonment from the date of his arrest.

Charge reduced to culpable homicide not amounting to murder under s 304(b) of the Penal Code; accused sentenced to eight years imprisonment.

Reported by Fatin Mohd Ismail